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IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

No. 217

MOSES JOSEPH BRACEY, RAYMOND JOHNSON, KELLY WHITELY, ET AL.,
Petitioners,

vs.

EMANUEL LURAY,
Trading As
LURAY IRON & METAL COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

DANIEL E. KLEIN,
Attorney for Petitioners.

The Daily Record Co., Baltimore 3, Md.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The Petitioners, Moses Joseph Bracey, Raymond Johnson, Kelly Whitely, et al., respectfully pray that a writ of certiorari issue to review the decision of the United States Circuit Court of Appeals for the Fourth Circuit rendered April 2, 1947, affirming the order of the District Court for the District of Maryland dated October 7, 1946.

SUMMARY STATEMENT.

This case originated in an action brought under the Fair Labor Standards Act by certain employees (Petitioners here, and hereinafter referred to as employees) of a scrap iron and metal business in Baltimore, Maryland, against their employer (Respondent here, and hereinafter referred to as employer) to recover alleged unpaid minimum wages, unpaid overtime compensation and liquidated damages for labor performed during a period from 1938 to 1942. The employer denied the coverage of the Act and the United States District Court for the District of Maryland found a judgment in favor of the employer, 49 F. Sup. 821, which decision was reversed and the case remanded by the United States Circuit Court of Appeals for the Fourth Circuit, 138 F. 2d 8. Judgments for unpaid minimum wages, overtime compensation and liquidated damages were accordingly entered in favor of the employees on June 17, 1944.

The employer attempted a compromise of these judgments by a written agreement (12)* to pay in a stipulated manner one-half of the judgment of each employee—in other words, the unpaid minimum wages and overtime compensation, without paying the liquidated damages. The employees' attorneys entered into such compromise agreement for the employees although they doubted the validity of said agreement under the law as established by the decisions rendered up to that time. However, their clients, were weary of the protracted litigation during which time they had not received payment for their services performed years before, and hence entered into same.

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* All figures appearing in parenthesis refer to page numbers in the Transcript of Record (Supreme Court of the United States), unless otherwise noted.

It was represented by the employer that he was insolvent but there was no substantiation of this other than his own statement.

Among the provisions of the aforesaid agreement was the following:

> "9. Upon default by the party of the first part in the payment of any one of the monthly payments hereinbefore set forth, this agreement shall immediately be null and void and the entire balance due under said judgments shall become immediately due and payable and all payments theretofore made shall be applied to the reduction of the amounts in full of the judgments of said parties and thereafter the said parties shall not be restricted or limited in the prosecution of any legal process whatsoever for collection thereof."

Payments were not made by the employer at the times stipulated, but ultimately some five months after the last payment was due, the agreed amounts of one-half of the judgments had been paid. The employees' counsel took the position that the agreement had been breached, and pursuant to their clients instructions, refused to surrender releases and orders of satisfaction to counsel for the employer.

The employees then employed present counsel, who after prolonged negotiations with counsel for the employer for the payment of the unpaid balances on the judgments, issued attachments on August 9, 1946 for these employees and also for one, Robert Allen, who was not a party to the aforesaid agreement, and had not received any payment at all on his judgment. The United States Marshal filed his return as follows:

> "August 12, 1946, attachment laid in hands of defendant attaching merchandise of the value of $18,500.00."

The employer then on August 27, 1946, filed a Motion to quash attachments and to enter the judgments "Settled and Satisfied."

Thereafter, on September 5, 1946, the employees, filed a Motion to dismiss the preceding Motion, and answered the said Petition.

The case came on for hearing before the United States District Court for the District of Maryland to determine which of these two Motions should prevail, and resulted in passage of the District Court's Order of October 7, 1946, dismissing the employees' Motion, quashing their attachments on the judgments, and directing the Clerk to enter Orders of Satisfaction (except as to Robert Allen).

An appeal was entered by the employees to the United States Circuit Court of Appeals for the Fourth Circuit where the judgment of the United States District Court for the District of Maryland was affirmed on April 2, 1947.

JURISDICTION.

The jurisdiction of this Court to issue a writ of certiorari to review a judgment of a circuit court of appeals is invoked under Section 240 of the Judicial Code as amended (28 U. S. C. 347).

OPINIONS BELOW.

District Court's opinion (23), and Circuit Court of Appeals opinion (34).

QUESTIONS PRESENTED.

1. Can an adverse judgment obtained by an employee against an employer under the provisions of the Fair Labor Standards Act for unpaid minimum wages, unpaid overtime compensation and liquidated damages be validly com-

promised by an agreement between the parties providing for the payment of a sum smaller than the face amount of the judgment?

2. Assuming that an adverse judgment obtained by an employee against an employer under the provisions of the Fair Labor Standards Act for unpaid minimum wages, unpaid overtime compensation and liquidated damages may be validly compromised by an agreement between the parties providing for the payment of a sum smaller than the face amount of the judgment, are the employees in this case entitled to recover their full judgments?

(a) Was the agreement of settlement a valid accord and satisfaction?

(b) Was there a waiver by the employees of the employer's material breach of the agreement sufficient to estop the employees from rescinding the agreement and collecting their judgments in full?

REASONS FOR GRANTING THE WRIT.

1. The United States Circuit Court of Appeals for the Fourth Circuit has decided a vital question of federal law of great practical importance in the application of the Fair Labor Standards Act, which has not been, but should be, settled by this Court. It has been decided by this Court that in the absence of a bona fide dispute between employer and employee as to liability under this Act, an employee's written waiver of his right to liquidated damages under Section 16 (b) does not bar subsequent action by the employee to recover such liquidated damages (Brooklyn Savings Bank v. O'Neil, 324 U. S. 697). Further, it has been likewise decided that an employer's liability for liquidated damages cannot be disposed of by a compromise or settlement of a bona fide dispute over coverage of the Act (D. A.

Schulte, Inc. v. Gangi, 328 U. S. 108). The instant case calls for a decision to determine whether a judgment obtained by an employee against an employer under the same provision of that Act can be compromised and settled. Stated in another way, do the previous decisions of this Court above referred to, hold that an employee must be *paid* unpaid minimum wages, unpaid overtime compensation and liquidated damages, or that it is only required that he obtain a judgment for same, which judgment can be validly compromised and settled? As the Circuit Court of Appeals said in its opinion (36), "Manifestly, from the standpoint of the public, this first question (referring to the above) is of great practical importance".

2. The decision of the Circuit Court of Appeals is in error in holding that there was an accord and satisfaction of the employees' judgments under the Fair Labor Standards Act.

3. The decision of the Circuit Court of Appeals is in error in holding that the employees waived the employer's material breach of the proposed agreement of settlement of the judgments under the Fair Labor Standards Act.

WHEREFORE, the Petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Fourth Circuit, commanding that Court to certify and send to this Court for its review and determination, on a day certain to be named therein, a full and complete transcript of the record and proceedings in the case numbered and entitled on its dockets No. 5571, Moses Joseph Bracey, Raymond Johnson, Kelly Whitely, et al, Appellants, *vs.* Emanuel Luray, trading as Luray Iron & Metal Company, Appellee, and that the decision of the

said United States Circuit Court of Appeals in said case be reversed, and that your Petitioners have such other and further relief in the premises as may be just.

MOSES JOSEPH BRACEY,
RAYMOND JOHNSON,
KELLY WHITELY, ET AL.

By DANIEL E. KLEIN,
Attorney for Petitioners.

CERTIFICATE.

I HEREBY CERTIFY, That I have examined the aforegoing Petition, that in my opinion it is well founded and entitled to the favorable consideration of the Court, and that it is not filed for the purpose of delay.

DANIEL E. KLEIN,
Fidelity Building,
Baltimore-1, Maryland

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MOSES JOSEPH BRACEY, RAYMOND JOHNSON, KELLY WHITELY, ET AL.,

Petitioners,

vs.

EMANUEL LURAY,
Trading As
LURAY IRON & METAL COMPANY,

Respondent.

BRIEF IN SUPPORT OF PETITION.

ARGUMENT.

QUESTION 1.

Can an Adverse Judgment obtained by an employee against an employer under the Provisions of the Fair Labor Standards Act for unpaid minimum wages, unpaid overtime compensation and liquidated damages, be validly compromised by an agreement between the parties providing for the payment of a sum smaller than the face amount of the Judgment?

This case presents for this Court's determination, another step in the series of questions of whether or not an employer and an employee may validly compromise, for less than full payment, the amount due an employee under the provisions of the Fair Labor Standards Act of 1938, 52 Stat. 1060, at 1069, 29 U. S. C. A. 216 (b).

The only possible distinction between the instant case and the decided cases hereinafter cited is the fact that a compromise of the amount due was attempted to be entered into after judgments were obtained against the employer, rather than before judgments.

The Petitioners herein, and one Robert Allen, were employees of the Respondent and on September 17, 1942, brought suit in the District Court of the United States for the District of Maryland for unpaid minimum wages, overtime compensation and liquidated damages under the provisions of the Fair Labor Standards Act (1). The District Judge ruled in favor of the employer, 49 F. Sup. 821. On appeal to the Circuit Court of Appeals this judgment was reversed, 138 F. (2d) 8. The case was remanded for further proceedings to determine the amount due the various employees, and it was then referred by the District Court to a Special Master, who made his findings which were approved by the Court. No further appeal was taken and the judgments became final. Thereafter, on August 11, 1944, attachments were laid and execution levied on Defendant's property (2). The Marshal made his return as follows:

> "Levied and appraised as per Schedule herewith returned and articles listed left on the premises known as Luray Iron & Metal Co.—12th August, 1944" (2).

After the Marshal's return, the employer and the employees entered into an agreement dated August 31, 1944

(12) wherein the employees, who were then judgment creditors, agreed to settle the amounts due them by the acceptance of sums found to be due as unpaid minimum wages and overtime compensation, without payment of liquidated damages. The employer used, as an inducement for the settlement, his alleged insolvency and submitted to the employees and their attorneys, a statement of assets and liabilities which he represented to be correct (9-11), but which they did not believe was true. As will be pointed out later, the agreement for the settlement of the judgments does not recite any representation of the insolvency of the employer. It appears that the employees' real inducing factor was weariness of the litigation which had prevented them from being paid for their labors of years before.

Under the terms of this agreement, monthly payments were to be made to the attorneys for the employees, and the final payment was due on November 1, 1945. The payments were not made as agreed upon, but the final payment was made on or about March 18, 1946. The attorneys for the employees repeatedly wrote letters advising the employer that the acceptances of his overdue checks were not to be construed as a waiver of the agreement, but that the overdue payments were accepted only as a credit against the judgment as a whole, samples of these letters appear in the Record (19-22).

It has long been settled that an agreement of an employee to accept less than the amount due him for overtime compensation is invalid.

Then, by the decision of this Court in the case of Brooklyn Savings Bank v. O'Neil, 324 U. S. 697, 65 S. Ct. 895, (April 9, 1945), it was decided that in the absence of a bona fide dispute between the parties as to coverage, an employee's

written waiver of his right to liquidated damages under the Fair Labor Standards Act did not bar a subsequent action to recover liquidated damages.

Next came the case of D. A. Schulte, Inc. v. Gangi, 328 U. S. 108, 66 S. Ct. 925, decided by this Court on April 29, 1946, wherein it was squarely held that under the Fair Labor Standards Act neither a claim for overtime compensation nor liquidated damages for withholding overtime compensation is capable of reduction by compromise even though there is a bona fide controversy over coverage. In this case the employees executed full releases under seals for the amount of the overtime compensation only, and then brought suit to recover the liquidated damages due them under Section 16 (b) of the Act.

It would thus seem that all questions as to the ability of employers and employees to compromise amounts due under the Act had been decided by the above cases, which certainly held that no matter what agreement the employee may enter into, he must be *paid* the full amount due him for unpaid minimum wages, overtime compensation and liquidated damages. However, such will not be true if the rulings of the lower Courts are affirmed in this case because of a distinction which they make between a settlement entered into before a judgment and a settlement entered into after a judgment. The District Court in its opinion reasoned exactly contrary to the reasoning of the Supreme Court in the above cases, and said (30):

> "In the present case the employees saw fit to have the courts litigate their rights and reduce them to final judgment. How can these employees any longer be said to need protection from their employer 'because of inequality of bargaining power?' They have been awarded their full rights with respect to which their bargaining power is said to be unequal. The bargain-

> ing that is interdicted can no longer occur. The present plaintiffs were willing to take less because 'a bird in the hand is worth two in the bush'."

It is needless to point out that if compromise settlements after judgments are permitted, a loophole will have been established whereby employers may allow judgments to be entered against them for any amount and then compromise the judgments validly. But such a proceeding will nullify what this Court said in the Brooklyn Savings Bank Case, supra, at page 710:

> "To permit an employer to secure a release from the worker who needs his wages promptly will tend to nullify the deterrent effect which Congress plainly intended that section 16 (b) should have. Knowledge on the part of the employer that he cannot escape liability for liquidated damages by taking advantage of the needs of his employees tends to insure compliance in the first place. To allow contracts for waiver of liquidated damages approximates situations where courts have uniformly held that contracts tending to encourage violation of laws are void as contrary to public policy."

Consider this statement of principle together with the facts in the instant case. Here the employees started their suit in 1942 for wages earned as early as 1938, and final payment of the unpaid minimum wages and overtime compensation *only* was received in 1946. We respectfully submit, to permit a judgment such as this to be compromised is even more serious because of the length of time involved than where an employer voluntarily compromised before judgment.

And the lower Courts to further substantiate their reasoning as to why in their opinions (31-32 and 37) the judgments in this case are subject to compromise, quote a foot-

note to the opinion in the Schulte case (328 U. S. at page 114):

> " 'Petitioner draws the inference that bona fide stipulated judgments on alleged Wage-Hour violations for less than the amounts actually due stand in no better position than bona fide settlements. Even though stipulated judgments may be obtained, where the settlements are proposed in controversies between employers and employees over violations of the Act, by the simple device of filing suits and entering agreed judgments, we think the requirement of pleading the issues and submitting the judgment to judicial scrutiny may differentiate stipulated judgments from controversies by the parties. At any rate, the suggestion of petitioner is argumentative only as no judgment was entered in this case'."

The Supreme Court did not find it necessary in the Schulte case, supra, to determine the question of the settlement of controversies between employers and employees over violations of the Act, by the simple device of filing suits and entering agreed judgments. It merely stated, "The suggestion of petitioner is argumentative only as no judgment was entered in this case." It is a far different situation in the present case. Here the matter is not argumentative, but a fact. Here, there was no simple device of filing suit and entering agreed judgments, either stipulated or by consent. Here, adverse judgments were entered in favor of the employees after long drawn out litigation. What good is protection of employees up to the point of establishing the legal amount due them if when established it can be bargained away? It is *payment* of the amount due that satisfies the purposes of the Act.

The Schulte case was decided by the Supreme Court on April 29, 1946. On February 6, 1946, the District Court for the District of New Jersey, in the case of Rogan v.

Essex County News, 65 F. Sup. 82, refused to enter a proposed final judgment and satisfaction thereof approving a final settlement of claims for unpaid overtime compensation, although both employer and employee joined in the application for the entry of the judgment, in the absence of a clear showing that the statutory requirements had been met, since the public interest as well as the rights of private litigants must be protected. The Court called to the attention of the parties the decision of the United States Supreme Court in Brooklyn Bank v. O'Neil, supra, and in effect told the parties no final judgment nor satisfaction thereof could be entered and approved by the Court unless the employees *received* both their over-time compensation and their liquidated damages.

In the case above cited, the Court refused to approve a proposed settlement for less than the entire amount due and exercised the judicial scrutiny mentioned by this Court in the Schulte case. What a far different situation than in the instant case, where the Courts below not only declared valid an agreement for the settlement of the amount due to the employee by payment of the overtime compensation alone, but also directed that the adverse judgments obtained were satisfied by such settlement, and directed the Clerk to enter Orders of Satisfaction of the judgments. The judicial scrutiny exercised by the Courts in this case, we respectfully submit, permitted the employer to escape all liability except for payment of the wages for unpaid minimum wages and overtime compensation, although this case possesses all the elements that this Court has declared were the purposes of the Act to protect; namely, to prevent any attempt to avoid payment, protracted litigation, long delay in payment of only a portion of the amount due, and relief from payment of liquidated damages.

Both the District Court and the Circuit Court of Appeals in their opinions (29 and 37) held that a judgment obtained after adjudication of the rights of employees under the Fair Labor Standards Act is validly the subject for compromise; whereas, admittedly prior to obtaining such judgment no compromise would be valid. In their opinions stress is laid on the possible advantage to employees in compromising judgments, and in the instant case the represented insolvency of the employer is considered of great weight. The District Court speaks of it in terms of "a bird in the hand is worth two in the bush" (30), and the Circuit Court of Appeals calls it a "distinctive feature" (37). All of the arguments that can be advanced in favor of validating agreements for the employees' benefit were advanced in the Schulte case, supra, where there was a bona fide dispute over coverage, and the employees stood to lose all, if it was decided that the employer did not come under the Act. This Court said in that case at pages 927 and 928:

> "Petitioner points out that a seaman may release his claims under statutes enacted for his protection in a bona fide settlement and that settlement of accrued claims is permitted under the Federal Employers' Liability Act, 45 U. S. C. A. 51 et seq. Petitioner adds that in doubtful cases it may be advantageous to the employee to compromise, that to force litigation may disrupt employer-employee relationships, and that numerous compromise settlements have been made for less than full liability."

It, therefore, seems axiomatic that if the Act is intended to provide protection for employees so that they cannot bargain away by compromise their unestablished rights, how could such purpose of the Act prevail if they are allowed to bargain away final and established rights?

In the case of Phelan v. Carstens Linnekin & Wilson, 62 N. Y. S. 2nd 214 (N. Y. C. 2d Dist. 5/1/46), certain employees claimed overtime compensation and liquidated damages. A judgment by consent was entered in the United States District Court in the amount of $700.00 against the Defendant who owned the building. This $700.00 was paid and the Plaintiff executed a general release running only to the owner of the building. Thereafter suit was brought against the managing agent of the building for the amount of the balance due the Claimant for overtime compensation and liquidated damages and attorney's fees. The Defendant pleaded the Plaintiff's judgment in the Federal Court was a bar to the new action, and the matter was res judicata. The Court held (page 216) "we find that a release of a claim under the Act has been held to be invalid unless payment is made in full for the overtime period and liquidated damages" citing the Brooklyn Savings Bank v. O'Neil case, supra.

The Court further held in that case, that where there was no dispute concerning the overtime hours, a judgment entered in the Federal Court pursuant to stipulations of the parties for an amount that was concededly less than the amount due was not res judicata barring a subsequent action to recover the balance of overtime compensation due and liquidated damages. The Court stated at page 217, "that notwithstanding payment was made in the form of an ambiguous judgment, which is concededly less than the full amount that is due and owing the Plaintiff such judgment would not operate as a satisfaction and discharge, nor release the Defendant from paying the statutory obligation. To up-hold the defense of res judicata would constitute a judicial sanction of an evasion of the Act's terms."

We submit that the above case borders closely on the instant case except that in it there was a stipulated judg-

ment involved rather than an adverse judgment and except that the suit was brought against one other than the original Defendant, on the theory the managing agent was a co-obligor.

While this Court in the Schulte case, supra, at page 928 said: "We do not find it necessary to determine whether the liability for unpaid wages and liquidated damages that Section 16 (b) creates is unitary or divisible", it has been held in several United States Circuit Court cases that the liability is unitary. In the case of Rigopoulos v. Kervan (2d Cir.) 140 F. 2d 506, 508, it was held that the provisions of the Act for liquidated damages is mandatory on the Courts; and that, the overtime compensation and liquidated damages are a single entire liability which is not discharged in toto by paying one half of it. "Also, that where there was nothing in dispute between the parties at the time the Defendant made his payments, there can be no consideration for an accord even at common law", and hence there could be no valid accord and satisfaction barring the employee's action for liquidated damages. The Court stated at page 507, "It is urged that such a construction of the statute produces too harsh a result; we see no escape from the statutory language; the harshness is inherent in the legislation". The fact that some of the money was paid in pursuance of a compromise of such a suit we regard as completely irrelevant in the present action.

Much to the same effect is the case of Birbalas v. Cueno Printing Industries, Inc. (7th Cir.) 140 F. 2d 826, at page 828, where the Court held "the language of the statute and its interpretation by various Courts tend toward promulgation of the doctrine that in such cases as this, the liability created by Congress for non-payment of overtime wages, for liquidated damages, and attorneys' fees may not be

compromised; that it is a single and an entire cause of action which cannot be discharged or satisfied by merely paying part of it." Any sort of an agreement reached allowing employers to pay less would render nugatory the objectives of the Act.

This Court stated in the Brooklyn Savings Bank case, supra:

> "It has been held in this and other Courts that a statutory right conferred on a private party but affecting the public interest may not be waived or released if such waiver or release contravenes the statutory policy."

Citing Midstate Horticultural Company v. Pennsylvania Railroad Company, 320 U. S. 356, 64 Ct. 128, 130, 88 L. Ed. 96, 104, and other cases.

In the Midstate case, supra, the Supreme Court decided that the expiration of a time limit fixed by a provision of the Interstate Commerce Act for the bringing of actions by carriers for the recovery of their charges could not be waived by a private agreement between the carrier and the shipper. The Court pointed out the effect of such a private agreement would be to inflict a discrimination which was against the intent of the Interstate Commerce Act, and would destroy its purpose.

We think the same reasoning which was applied by this Court in the Midstate case, supra, in pointing out how the terms of the Interstate Commerce Act could be evaded, applies with equal force to the present case. If a judgment once obtained under the provisions of the Fair Labor Standards Act may be settled for less than the full amount due thereon, then certain employers will escape paying the full liability imposed upon them by the Act in violation of

the legislative intent; not only to the detriment of their employees but also enable them to obtain a competitive advantage over other employers.

As stated in the Brooklyn Savings Bank case, supra, at page 710:

> "Prohibition of waiver of claims for liquidated damages accords with the Congressional policy of uniformity in the application of the provisions of the Act to all employers subject thereto, unless expressly exempted by the provisions of the Act. An employer is not to be allowed to gain a competitive advantage by reason of the fact that his employees are more willing to waive claims for liquidated damages than are those of his competitor. The same consideration calling for equality of treatment which we found so compelling in Midstate Horticultural Co., Inc., supra, exist here."

Considering the economic objects of the Fair Labor Standards Act, and the fact that the decisions of this Court have manifested and fortified the legislative intent that the employee should receive actual *payment* of the wages due him under the terms of the Act, which include liquidated damages, it would seem that the distinction made in this case by the lower Courts between the rights of the employee before, and after, a judgment is recovered, are fallacious and illusory. The Act certainly does not contemplate that its purposes end when the employee recovers a judgment, and from then on the employer may bargain with the employee to avoid his responsibility; nor is such a disastrous conclusion borne out by the decisions of this Court. If *payment* of the wages due is the ultimate object of the Act, and that is undeniable, then the recovery of a judgment is merely a link in the chain forged by the Act to achieve it.

QUESTION 2.

Assuming that an Adverse Judgment obtained by an employee against an employer under the Provisions of the Fair Labor Standards Act for unpaid minimum wages, unpaid overtime compensation and liquidated damages may be validly compromised by an agreement between the parties providing for the payment of a sum smaller than the face amount of the Judgment, are the employees in this case entitled to recover their full Judgments?

(a) Was the Agreement of Settlement a Valid Accord and Satisfaction?

It is the Petitioners' contention that even if this Honorable Court decides that a judgment obtained under the provisions of the Fair Labor Standards Act may be compromised, yet, there was not a valid accord and satisfaction in this case. It has long been settled law that a liquidated demand or a judgment may be the subject of a valid accord and satisfaction, but some consideration must be involved in addition to the amount of money paid.

As stated in 1 Am. Jur. "Accord and Satisfaction", Sec. 8:

> "As a general rule, since a judgment is a liquidated demand, it cannot be made the subject of an accord and satisfaction based upon mere part payment since part payment alone is not ordinarily deemed a sufficient consideration for an accord and satisfaction of a liquidated demand. There must be some circumstances or acts in addition to part payment in order to form sufficient consideration for an accord and satisfaction of a liquidated demand. An accord and satisfaction of a judgment is governed by the same rule. In most of the cases in which an attempted accord and satisfaction of a judgment is not sustained, the reason for not sustaining the accord and satisfaction is solely because of the want of a sufficient consideration, and not

> because a judgment is not a proper subject for an accord and satisfaction if based on a consideration which would be deemed sufficient to support an accord and satisfaction of any other sort of liquidated demand. Further, when an appeal is pending or is in good faith threatened and the judgment is appealable, it is said that the claim is in dispute to such an extent that a part payment accepted in full satisfaction will discharge the judgment."

In the present case, no further appeal was taken by the employer, so that the only possible additional consideration was the weakly represented insolvency of the employer. It is true the actual insolvency of a debtor will support a necessary consideration for a valid accord and satisfaction, as stated in 1 Am. Jur. "Accord and Satisfaction", Sec. 46:

> "Where the debtor is known to the creditor to be insolvent, and the creditor, in consideration of such fact, agrees to and does accept part payment of a liquidated demand in full satisfaction, the Courts generally recognize this as an exception to the general rule and uphold the transaction as a good accord and satisfaction * * *."

However, in the instant case, the judgment debtor (employer) made no attempt to make a uniform settlement with all of his creditors. Nor did he propose any settlement based on the degree of his insolvency. When his employees, who were then judgment creditors, had secured a lien against his assets, for which a Marshal's sale had been scheduled, he attempted a settlement with these of his former employees on the basis of unpaid minimum wages and unpaid overtime compensation only. The proposed settlement did not even include one of the employee-judgment creditors, Robert Allen, who did not sign the agree-

ment, but was a party to the original suit. The inequity of such proposed settlement with the employees here, does in itself, lack a consideration sufficient to constitute a valid accord and satisfaction.

Another compelling ground for the conclusion that there was not an accord and satisfaction is the absence of any evidence of the employer's insolvency other than his self-serving statement (9-11). When analyzed this statement shows the use of "round figures" in stating assets and liabilities, and no real portrayal of his financial condition. The Marshal's return showing merchandise attached of a value of $18,500.00 (5), and the posting of a $3500.00 corporate bond by the employer pending appeal from the decision of the District Court (3), would not indicate his insolvency and inability to pay in full the judgments of these employees. Therefore, the mere unsubstantiated representation by the employer that he was insolvent, and his failure to deal with his creditors as an insolvent, would not form the basis for the application of the exception to the general rule that mere part payment of a judgment is not an accord and satisfaction thereof.

Finally and decisively, the only consideration named in the agreement (12-15) is the amount due each employee for unpaid minimum wages and unpaid overtime, and ten cents (10¢) in settlement of his liquidated damages. The absence of any recital of the employer's insolvency shows that such was not accepted as a fact by the employees, or most certainly was not a consideration for the agreement so as to form the basis for an accord and satisfaction of same.

(b) Was their a Waiver by the Employees of the Employer's Material Breach of the Agreement Sufficient to Estop the Employees from Rescinding the Agreement and Collecting their Judgments in Full?

The District Court held that there was a material breach of the agreement by the employer (25), and the Circuit Court of Appeals concurred in this view (39):

> "We agree again with the District Court that under the settlement agreement the default by employer in meeting the agreed monthly payments was a breach sufficiently material to enable the employees, if they so elected, to treat the settlement agreement (under Clause 9, set out earlier in this opinion) as 'null and void' and to treat all future payments by employer as merely a 'reduction of the amounts in full of the judgments'."

However, both Courts below held that the employees waived their right to annul the agreement for the reasons, (a) that they did not sufficiently indicate, until too late, their intention not to waive the breach, (b) that they accepted the payments until the full agreed amount was paid even though not paid as specifically stipulated in the agreement. Numerous letters written by counsel for the employees to counsel for the employer of which samples appear in the record (19-22) clearly indicated that the agreement was being treated as breached. The letter referred to in the opinion of the Circuit Court of Appeals (39-40), was written on January 3, 1945, and while that Court says that it does not indicate a present intention of forfeiture, no reference is made to the much later letters written October 4, 1945, January 4, 1946 and March 18, 1946, which clearly state that the payments were accepted without any waiver of the provisions of the agreement which was in default.

Then too, the Circuit Court of Appeals in its opinion says that four-fifths of the agreed amount had been paid before there was a default (35), but actually only a little over one-half of the amounts agreed to be paid these employees had been paid them, since $2500.00 of the total sum of $5394.65 was paid immediately to counsel and to the Special Master under an order of the District Court. The "unreasonable length of time" referred to by the lower Courts as having transpired before the employees took any action, was less than five months from the last payment, and during that interim counsel for the employer knew that counsel for the employees considered the contract forfeited when they refused to turn over releases and orders of satisfaction, and present counsel for the employees had been in communication with counsel for the employer about collection of the unpaid balances on the judgments. Under these circumstances, standing alone, it cannot be considered that the employees would be estopped from reviving the judgments.

If settlement of judgments obtained under the Fair Labor Standards Act are to be validated, the purposes of the Act would seem to demand that any agreement of settlement be strictly complied with in order for an employer to thereby escape his clear obligations under the Act. The employee should not be put to expense and time to enforce such an agreement.

CONCLUSION.

It is respectfully submitted that the writ of certiorari prayed for should be granted and that the decision of the United States Circuit Court of Appeals for the Fourth Circuit be reversed with costs.

DANIEL E. KLEIN,
Attorney for Petitioners.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

No. 217

MOSES JOSEPH BRACEY, RAYMOND JOHNSON, KELLY WHITELY, ET AL.,
Petitioners,

VS.

EMANUEL LURAY,
Trading As
LURAY IRON AND METAL COMPANY,
Respondent.

ANSWER AND BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

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The Daily Record Co., Baltimore 3, Md.

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ANSWER TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

To the Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States:

The Respondent, Emanuel Luray, trading as Luray Iron and Metal Company, opposes the issuing of a writ of certiorari to review the decision of the United States Circuit Court of Appeals for the Fourth Circuit rendered April 2, 1947, affirming the order of the District Court for the District of Maryland dated October 7, 1946, as prayed by the Petitioners.

SUMMARY STATEMENT.

This litigation originated in an action filed by the Petitioners against the Respondent to recover unpaid minimum wages, overtime compensation and liquidated damages and attorney's fee, under Section 16 (b) of the Act (29 U. S. C. A. Sec. 16 (b)). After the hearing the lower Court gave judgment for the Respondent (49 F. Supp. 821). Upon appeal, the United States Circuit Court of Appeals for the Fourth Circuit reversed the lower Court, and the case was remanded for further proceedings to determine the amounts due the various Petitioners (138 F. (2) 8).

The Federal Court then referred the matter to a Special Master, whose findings were approved and judgments in favor of the Petitioners were entered for the sum of $2894.65 for minimum wages and overtime, $2894.65 as liquidated damages, $1000.00 Masters fee and $1500.00 counsel fee.

The Respondent being at that time insolvent and unable to pay the aforesaid judgment, entered into an agreement with the Petitioners (pp. 12-15) stipulating therein, that upon payment of the sum of $2500.00, representing the Master's and counsel fee and upon further payment of the sum of $2894.65 in monthly instalments of $200.00 each, the Petitioners would execute proper releases and orders of satisfaction for the entire judgment. After the balance of $2894.65 was paid in full, Petitioners instead of executing proper releases and orders of satisfaction, as agreed upon, caused an attachment to be issued. The said attachment was countered with the "motion to quash" which said motion was granted by the United States District Court for the District of Maryland on October 7, 1946. Appeal was entered by the Petitioners to the United States Circuit Court of Appeals for the Fourth Circuit where the judgment of the United States District Court for the District of Maryland was affirmed on April 2, 1947.

QUESTIONS PRESENTED.

1. Is the agreement dated August 31, 1944, a good and valid contract of compromise and settlement?

2. Was the agreement dated on August 31, 1944, breached by the Respondent?

REASONS FOR OPPOSING THE GRANTING OF THE WRIT.

The Respondent in opposing the granting of the writ maintains that the case herein contains no special and important reasons to be entitled to it. The decision rendered by the United States Circuit Court of Appeals for the Fourth Circuit is not in conflict with the decision of any other Circuit Court of Appeals on the same matter, nor has it decided an important question of local law in conflict with applicable local decisions, nor has it decided a question of federal law which has not been settled by this honorable Court, nor has it decided a federal question in conflict with applicable decisions of the honorable Court, nor has it departed from the accepted and usual course of judicial proceedings, as to call for an exercise of this honorable Court's power of supervision.

EMANUEL LURAY,
Trading as Luray Iron
and Metal Company,
Respondent.

By LEWIS W. LAKE,
WILLIAM SAXON,
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Baltimore 2, Maryland,
Attorneys for Respondent.

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BRIEF OPPOSING THE GRANTING OF THE WRIT OF CERTIORARI.

ARGUMENT.

QUESTION 1.

IS THE AGREEMENT DATED AUGUST 31st, 1944, A GOOD AND VALID CONTRACT OF COMPROMISE AND SETTLEMENT?

When the judgment for minimum wage, overtime and liquidated damages, was finally rendered in the original case, on July 17, 1944, the Respondent was insolvent and unable to pay the judgments. The Respondent submitted to the Petitioners an itemized statement of all his assets and liabilities, showing his liabilities to be 100% greater

than his assets (pp. 9-11). It was subsequent to that date and on August 31, 1944, that the agreement of settlement was entered into (pp. 12-15), wherein it was agreed by the Respondent, to pay each Petitioner his respective claim for unpaid minimum wages and/or unpaid overtime in full and a nominal consideration in settlement of judgments for liquidated damages, in addition to the Master's and counsel fees. The question before this Honorable Court is, whether "liquidated damages", under Section 16 (b) of the Act, can be settled for less than the full amount alloted by the Court, after a full and complete hearing in open Court and after judgment is entered?

The Respondent maintains, that the agreement of settlement is valid because:

A. The agreement involved exceptional circumstances of the kind *held* to *justify* a waiver agreement.

B. The agreement was a legal compromise of a final judgment and not a compromise or "waiver of a subsequent right of action for liquidated damages."

A.

The agreement involved exceptional circumstances of the kind held to justify a waiver agreement.

Even if it is admitted, that the herein agreement was not a settlement of a final judgment, but was a waiver of a subsequent right of action for liquidated damages, nevertheless, under the circumstances, in the present case, the waiver was justified.

The facts in this case show that the Respondent was insolvent at the time the judgment was rendered, and should the Petitioners have insisted on full payment of liquidated damages at that time, the Respondent would have been

compelled to apply for adjudication in Bankruptcy. This would have been disastrous to all concerned, especially to the Petitioners. The Petitioners have actually benefited by the settlement, since they received more than 50% of their total judgment. Even the former solicitors of the Petitioners, by joining in the agreement and by the nature of their testimony, admitted that this matter involved exceptional circumstances to justify the settlement.

This Honorable Court held in the case of Brooklyn Bank v. Oneil, 324 U. S. 697, 65 S. Ct. 895, (Apr. 9, 1945), in referring to "exceptional circumstances", said on page 709, as follows:

> ". . . Nor does the instant case involve exceptional circumstances of the kind held to justify a waiver agreement such as was upheld in Fort Smith & Western R. Co. v. Mills, 253 U. S. 206."

The facts in the case of Fort Smith & Western R. Co. v. Mills, supra, show that the railroad entered into an agreement with its employees, fixing their wages for less than prescribed by the Adamson Act of 1916, and this Honorable Court said on page 208, as follows:

> ". . . An insolvent road has succeeded in making satisfactory terms with its men, enabling it to go on, barely paying its way, if it did so, not without impairing even the mortgage security, not to speak of its capital. We must accept the allegations of the bill and must assume that the men were not merely negatively refraining from demands under the Act but, presumably appreciating the situation, desired to keep on as they were. To break up such a bargain would be at least unjust and impolitic and not at all within the ends that the Adamson Law had in view. We think it reasonable to assume that the circumstances in which, and the purposes for which the law was passed, import an exception in a case like this."

Because of the aforesaid, the Respondent respectfully maintains that the agreement of settlement dated August 31, 1944, was a good and valid compromise and settlement.

B.

The agreement was a legal compromise of a final judgment and not a compromise or "waiver of a subsequent right of action for liquidated damages."

This Honorable Court said in the case of Brooklyn Bank v. Oneil, supra, that in the *absence* of a bona fide dispute between the parties as to liability, employees' written waiver of his right to liquidated damages under Sec. 16 (b) does not bar a subsequent action to recover liquidated damages. While in the present case, there was a bona fide dispute between the parties, as proven by the decision of United States District Court for the District of Maryland and the United States Circuit Court of Appeals for the Fourth Circuit. The judgment had been obtained and was a matter of record, where the agreement of settlement was entered into. In fact this Honorable Court amended in the above case that (page 713):

> ". . . Our decision of the issues raised in No. 445 and No. 554 has not necessitated a determination of what limitation, if any, Sec. 16 (b) of the Act places on the validity of agreements between an employer and employee to settle claims arising under the Act if the settlement is made as the result of a bona fide dispute between the two parties, in consideration of a bona fide compromise settlement. Neither of the above mentioned cases presented such issues for our consideration. . . ."

QUESTION 2.

WAS THE AGREEMENT DATED AUGUST 31, 1944, BREACHED BY THE RESPONDENT?

The Petitioners ultimately received all that they were entitled to under the agreement, although the monthly payments were completed in March, 1946, instead of November, 1945. It is true that the regularity in payments was disturbed about June, 1945, nevertheless, at that time four-fifths of the indebtedness had already been paid.

It is also significant that nothing was done by the Petitioners to repudiate the agreement until August 9, 1946, about five months after all the payments were completed. In addition, it was plainly proven that an extension of time to make the monthly payments was given by the Petitioners. That the time was not of the essence, was clearly manifested by the action of the Petitioners, in continuing to accept payments and failing to apprize the Respondent of their intention to declare the agreement breached.

The Court of Appeals of Maryland, in the case of Shriver Co. v. Interocean Co., 157 Md. 341, said on page 352, as follows:

> "... When payments have been customarily received later than a day specified and the dealer decides to disallow any further grace, in order to put himself in position to rescind for failure to pay on time, he must give the debtor notice that the terms of the contract must be observed, or that no further delays will be tolerated. ..."

Also in the case of Kemp v. Weber, 180 Md. 362, the Court said on pages 365-366:

> "... When a party to a contract is faced by some failure in carrying out its terms on the part of the other party, he has, in general, either a right to retain

the contract, and collect damages for its breach, or a right to rescind the contract and recover his own expenditures. Obviously he cannot do both. The contract cannot be in effect, and at the same time rescinded. If in effect, he can get damages; if rescinded, he must return his benefits, and receive his expenditures. He cannot of course, retain the benefits and get back his expenditures. He would then be receiving a free gift of whatever he got under the contract. He, therefore, has a choice. . . ."

CONCLUSION.

It is respectfully submitted that the Writ of Certiorari prayed for should not be granted because there are no special and important reasons given therefore.

Respectfully submitted,

LEWIS W. LAKE,
WILLIAM SAXON,
Attorneys for Respondent.